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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. _____

EARL DEAN EFFLER,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Earl Dean Effler prays for the issuance of a writ of certiorari to review the judgment of the Supreme Court of the State of Tennessee entered on April 1, 1974, wherein it denied a petition for certiorari filed with it on February 26, 1974, in which petitioner requested a review and reversal of the judgment and decision of the Court of Criminal Appeals of Tennessee filed on February 25, 1974, thereby resulting in his conviction becoming final in the State of Tennessee Criminal Appellate System.

I

CITATIONS TO OPINIONS OF LOWER COURTS

The Opinion of the Court of Criminal Appeals of Tennessee consisting of three pages was rendered on February 25, 1974, and apparently has not as yet been reported in the official or unofficial reports, but a copy of said Opinion is appended hereto and set out verbatim in the Appendix (p. A. 26). The Judgment entered pursuant to said Opinion is likewise set out verbatim hereto in the Appendix (p. A. 29), and from said Judgment a Petition for Writ of Certiorari to the Tennessee Supreme Court was filed by petitioner which was denied by the Tennessee Supreme Court on April 1, 1974, said Decree being likewise appended hereto in the Appendix (p. A. 31), which resulted in the Judgment heretofore referred to of the Court of Criminal Appeals of Tennessee becoming final in the State of Tennessee Court system. Thereafter on April 2, 1974, the Honorable W. Wayne Oliver, one of the Judges of the Court of Criminal Appeals of Tennessee, signed an Order granting a stay of execution of the Judgment rendered February 25, 1974, and allowing the petitioner ninety (90) days from April 1, 1974, within which to file a petition for writ of certiorari in the Supreme Court of the United States, a copy of said Order being appended hereto in the Appendix (p. A. 32). The present petition is being filed within that ninety (90) day period.

II

BASIS FOR JURISDICTION

The Judgment sought to be reviewed herein was entered on February 25, 1974. The jurisdiction of the Supreme Court of the United States to review said Judgment is con-

ferred on this Court by Title 28, United States Code Section 1257 (3).

III

QUESTION PRESENTED FOR REVIEW

"WAS THE SEARCH, SEIZURE, AND ADMISSIBILITY INTO EVIDENCE OF THAT PROPERTY UPON WHICH THE PETITIONER'S CONVICTION WAS BASED, REASONABLE UNDER THE SURROUNDING FACTS AND CIRCUMSTANCES SO AS TO BE CONSTITUTIONALLY PERMISSIBLE, AND NOT IN VIOLATION OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES?

IV

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides as follows:

> "Amendment 4. Unreasonable searches and seizures.--The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

V

STATEMENT OF CASE

In reviewing the factual matters necessary for a proper determination of the one issue raised herein, it is unnecessary to review the entire record and evidence introduced at the trial, as the material facts are practically undisputed, and it is only the law applicable thereto as expounded and interpreted in the numerous decisions dealing with motor vehicle searches which gives rise to the present controversy.

On Sunday, December 3, 1972, and at around 7:00 p.m. on that date, the petitioner was operating his automobile on a gravel road known as the Marshall Hill Road located in the Wildwood Community in Blount County, Tennessee, which adjoins Sevier County, Tennessee, the latter being the birthplace of the well-known female country and western recording star, Miss Dolly Parton, whose rise to fame and national recognition was hastened by her energetic rendition of a catchy little tune which she wrote and recorded that appropriately describes the thoughts which prompted the actions of the officers who conducted the search of petitioner's vehicle that produced the evidence upon which his conviction was obtained, and his resulting sentence of not more than ten years in the Tennessee State Penitentiary. The title of the tune, "Something Fishy", tells the story of a young wife whose suspicions are aroused by her husband's weak excuses to her for his consistently coming in late at night, and each time in the chorus Miss Parton concludes, "There must be something fishy going on," thereby indicating her tendency to be suspicious of his actions. With that brief introduction, and apologies to Miss Parton, the petitioner will now review the circumstances which led to his arrest, trial, conviction, penitentiary sentence,

appeals through the State of Tennessee court system, and finally to the present petition by which he seeks a review, reversal, and dismissal of said conviction.

The petitioner filed a written Motion to Suppress the evidence with the trial court, and a hearing was held thereon outside the presence of the jury at the beginning of the trial on January 2, 1973, which testimony is set forth in the Appendix hereto (pp. A. 4-A. 23), and which is copied verbatim from Vol. 1 of the Bill of Exceptions at Pages 2-26. Briefly summarized, it is as follows:

On Sunday, the third day of December, 1972, after dark at approximately 7:00 p.m., two deputies from the Blount County Sheriff's Department, Mark Proctor and Floyd F. Kimball, were on routine patrol in their cruiser on the Marshall Hill Road, a rural, gravel road in Blount County, Tennessee, when they came over a rise in the road and observed, approximately two hundred feet ahead of them, an automobile that was in the process of backing from the public road into a driveway that led into an open field, said vehicle stopping some fifteen to twenty feet off of the public road and up into the private drive. As the vehicle observed by them was so backing, they observed that its headlights were off, although its parking lights were on. The cruiser was brought to a stop in front of the driveway and the deputies got out. At about the same time, the occupant of the vehicle got out, walked the fifteen or twenty feet down to the edge of the public road and inquiry was made as to whether or not there was any trouble or if anything was wrong. The deputies observed that the person appeared to be nervous in that he was wringing his hands, lit a cigarette, took two or three puffs on it and stomped it out, and in general seemed to them to be trying to keep them away from his car. The deputies then walked the fifteen to twenty feet up to the petitioner's vehicle which

was then on private property off of the public road, shined their flashlights into it, and observed what appeared to them to be some antique rifles and Christmas packages on the back seat and back floorboard. Based on such observations by them, the petitioner was asked to have a seat in the cruiser while the deputies radioed for a superior officer, who shortly arrived at the scene, was briefed by the deputies on what had occurred, himself observed the property in the petitioner's vehicle, and almost immediately thereafter placed the petitioner under arrest for "investigation." At that time, there had been no report of the property found in petitioner's car as having been stolen in a burglary that had occurred earlier that day. Petitioner was then taken to the Blount County Jail where he was "booked on investigation" and held without bond or further charge for several days. Later that evening, a report was received regarding the property that had been taken in a burglary at the home of a Ken Cornett, and petitioner was eventually charged, indicted, tried and convicted of the offense of concealing stolen property, for which he received a sentence of not less than three years nor more than ten years in the state penitentiary.

VI

ARGUMENT AND CONTENTIONS IN SUPPORT FOR ALLOWANCE OF WRIT

The Court of Appeals of Tennessee has decided a Federal constitutional question of substance which has not been specifically heretofore determined by this Court, and in addition has decided said Federal question of substance in a way and manner which is not in accord with comparable applicable principles and decisions of this Court.

The petitioner, Earl Dean Effler, was indicted on December 14, 1972, by the Blount County Grand Jury for the crime of concealing stolen property, said indictment providing as follows:

> The Grand Jurors of the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire in and for the body of the County of Blount in the State aforesaid, upon their oaths, present that Earl Dean Effler late of the said County, heretofore, to wit, on the 3rd day of December, 1972, with force and arms, in the County of Blount aforesaid, then and there, unlawfully feloniously and fraudulently did conceal and aid in concealing certain personal property, to-wit: shotgun, two rifles, one pearl necklace, one electric shaver, one sewing chest, all to the value of $1,000.00, the property of Ken Cornett, which said property had been feloniously taken and stolen from the said owner, the said Earl Dean Effler aforesaid knowing the same to have been so obtained, with the fraudulent intent to convert the same to his own use and to deprive the true owner thereof, against the peace and dignity of the State of Tennessee.

Thereafter, on January 2, 1973, a Motion to Suppress was filed on his behalf which is appended hereto in the Appendix (p. A. 1), and a hearing was held thereon on January 2, 1973, outside the presence of the jury, the testimony introduced having been heretofore referred to and copied verbatim in the Appendix hereto (pp. A. 4-A. 23). The trial court overruled the Motion to Suppress, said Order being likewise appended hereto in the Appendix (p. A. 24). Thereafter, the petitioner was convicted of the offense charged in the indictment, the punishment being fixed at a maximum period of ten years in the state penitentiary, a copy of said felony judgment entered by the trial court on January 3, 1973, being appended hereto in

the Appendix (p. A. 25). From that final judgment, a timely Motion for New Trial was filed and overruled, and an appeal granted to the petitioner to the Court of Criminal Appeals of Tennessee upon the posting by him of a $5,000.00 appearance bond. The Court of Criminal Appeals affirmed the conviction as shown in its Opinion and Judgment appended hereto in the Appendix (pp. A. 26-A. 31), and from that Judgment a Petition for Certiorari in the Tennessee Supreme Court was filed by the petitioner. The Supreme Court of Tennessee denied the petition on April 1, 1974, said Order being appended hereto in the Appendix (p. A. 31), which resulted in the judgment of the Court of Criminal Appeals of Tennessee becoming final in the State of Tennessee court system. On April 2, 1974, an Order staying execution of that judgment and allowing the petitioner ninety days within which to file a Petition for Writ of Certiorari in the United States Supreme Court was entered, said Order likewise being appended hereto in the Appendix (p. A. 32). The sole issue raised in this Petition concerns the legality of the search and seizure of the items of personal property taken from his automobile, and introduced into evidence over his objection at the trial, without which no conviction could have been obtained. No case exactly in point has been found and particularly none has been found where the automobile searched was off of the public highway, was not stopped by the searching officers, where no arrest for any traffic offense was made by the searching officers, and where the searching officers at the time of the search had no knowledge regarding the items which were seized as having been stolen and made the basis for a criminal prosecution as in the present case. In this case, if the evidence is finally determined to be constitutionally admissible, it must necessarily be upon the consideration of certain principles derived from a variety of cases dealing with automobile searches. It is

now settled that evidence obtained by search and seizure in violation of the Fourth Amendment to the United States Constitution is inadmissible in state court proceedings, *Mapp v. Ohio*, (1961) 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684.

The Fourth Amendment to the United States Constitution requires that a warrant issue from a magistrate before a search and seizure may be conducted. To this rule there have been recognized certain exceptions not requiring a search warrant, and where the state relies upon one of the exceptions to the warrant requirement, the burden rests upon the state to demonstrate the availability of that exception in a particular case, see *United States v. Garay*, (1973) 477 F.2d 1306, and *Coolidge v. New Hampshire*, (1971) 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022. One of the exceptions to the warrant requirement is a search incident to a valid arrest, while another exception, more relevant to the present case, is a search without a warrant of moving objects such as motor vehicles.

> Searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.
>
> *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted). Fourth Amendment requirements are binding on the states. *Ker v. California*, 374 U.S. 23 (1963).

The exception regarding motor vehicles is justified on the grounds of necessity, that is, it is not practicable to secure a warrant under the circumstances because the vehicle can be quickly moved out of the locality or jurisdiction within which the warrant must be sought, this rule

having been first laid down in *Carroll v. United States*, (1925) 267 U.S. 132, 69 L. Ed. 2d 543, 43 S. Ct. 280.

The Court of Criminal Appeals of Tennessee has had recent occasion to cite with approval the *Carroll* decision, *supra*, in the case of *Vaughn v. State*, (1971) 477 S.W.2d 260, and at page 262 of said Opinion the following statement is made:

> "The pivotal question, as we view this record, is whether the search as conducted was legal. We are satisfied that the search of the trunk and the discovery of the fourteen cases of Robitussin was not connected in any manner with the offense which brought about the initial arrest. In fact, the only basis the officer had for making the search was his suspicion that was aroused by the mannerisms of Vaughn. This is not sufficient. In Carroll v. United States, 267 U.S. 132, 149, 45 S. Ct. 280, 283-284, 69 L. Ed. 543, the following may be found:
>
> "'On reason and authority the true rule is that if the search and seizure without a warrant are made upon probable cause, that is, upon a belief, reasonably arising out of circumstances known to the seizing officer, *that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid*.' (Emphasis added.)
>
> "The trooper had no prior knowledge of any other offense having been committed by the defendants, because, as he related, he was looking for anything he could find. In short, he was conducting a condemned exploratory search."

Beginning with *Carroll v. United States, supra*, there have been a series of cases from the United States Supreme

Court dealing with motor vehicle searches, and a comprehensive and exhaustive analysis of these cases is contained in the *Coolidge* case, *supra*, which reviewed practically every case dealing with the subject, including *Preston v. United States*, (1964) 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881, *Dyke v. Taylor Implement Mfg. Co., Inc.*, (1968) 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472, and *Chambers v. Maroney*, (1970) 399 U.S. 42, 26 L. Ed. 2d 419, 90 S. Ct. 1975.

Of the leading cases on the subject mentioned above, that of *Dyke v. Taylor Implement Mfg. Co., Inc.*, seems to be most similar to the present case, and coincidentally the *Dyke* case also arose in Tennessee with the Tennessee Supreme Court having affirmed the conviction from which certiorari was granted by the United States Supreme Court, and the conviction set aside on the grounds that the evidence was not obtained in compliance with the Fourth and Fourteenth Amendments.

An annotation in 10 A.L.R. 3d, page 314, entitled "Lawfulness of Search of Motor Vehicle Following Arrest for Traffic Violation," contains references to many lower court decisions dealing with the general subject of such searches. Although there was no testimony offered at the suppression hearing of any traffic violation committed by the petitioner, the Tennessee Court of Criminal Appeals' opinion mentions that the operation of the car on the highway at night without lights was in fact an offense committed in the officers' presence, and, therefore, the reason for petitioner making reference to this annotation. At pages 339 and 340 of that annotation in a discussion of *McCurdy v. State*, (1965) 42 Ala. App. 646, 176 So. 2d 53, the following pertinent statement is made:

> 'The court added that the search of the trunk of defendant's automobile could not be justified on the ground that the officer was looking for weapons of escape, and the search was quite obviously not for the purpose of disarming a prisoner or preventing an escape, but was for the purpose of a general exploration for whatever might turn up. It was further observed that it did not appear what crime defendant committed, and the court could not assume that he committed a crime of which there were fruits or implements subject to seizure, and that to justify a search and seizure as incidental to a lawful arrest, it must appear that the search and seizure had some reasonable relation to the offense for which the arrest was made."

The Court of Criminal Appeals of Tennessee in its relatively short Opinion, consisting of only three pages and citing only three cases in support of its Opinion affirming the conviction, seems to place particular emphasis on the fact that after the petitioner had alighted from his car and approached the officers' cruiser, that he was wringing his hands and nervously puffing on a cigarette. While the Tennessee appellate courts in its decision did not discuss the "furtive" movement or gesture theory as justifying the search, it perhaps would be relevant to a proper determination of its validity in this case. An annotation on that subject is contained in 45 A.L.R. 3d, Page 581, in which the principal case preceding the annotation is that of *People v. Superior Court of Yolo County*, (1970) 3 Cal. 3d 807, 91 Cal. Rptr. 729, 478 P.2d 449, and at page 580 in Vol. 45 of A.L.R. 3d, the following appropriate statement is made: "But a search 'prompted by a general curiosity to ascertain what, if anything, was within the defendant's vehicle' (*People v. Cruz*, (1968) *supra*, 264 Cal. App. 2d 437, 441) is manifestly exploratory in nature, and violates both the letter and the spirit of the Fourth Amendment."

From a review of the many cases on the subject of motor vehicle searches, it thus appears that at least two conditions must be present before the search of a motor vehicle may be legally justified without a warrant, the first of which is that of probable cause, which has been defined as knowledge of facts justifying a reasonably prudent person in believing that a crime has been or is being committed, and that evidence thereof is contained in the automobile in question, *People v. Erickson*, (1964) 31 Ill. 2d 320, 201 N.E.2d 422; and the second of which is that there must be exigent circumstances present which Webster defines as "requiring immediate aid of action." In that connection, let us examine the circumstances which initially confronted the searching officers in the present case:

On a Sunday night in December, 1972, in the nighttime, two deputies on routine patrol in a rural area observed a motor vehicle approximately two hundred feet to their front with only its parking lights on, backing into a private driveway. By the time they arrived to the location, the motor vehicle is stopped some fifteen to twenty feet off the public highway, and the occupant of that vehicle walks down to the stopped cruiser and inquires if anything is wrong. Neither of the deputies knows the person, no report has been received regarding the automobile being stolen, or of it containing contraband or stolen property, but based apparently only on the nervous mannerisms of the defendant, one of the deputies decides to take a further look into the automobile by walking the approximately twenty feet up the private driveway to it, and either by opening the door or shining his flashlight through the car window, he discovers what to him appears to be unusual items of personal property. The occupant is then detained by the two deputies until their superior arrives, and the superior upon observing the situation places the person under arrest for "in-

vestigation". Prior to the first deputy walking the distance from the public road to search the petitioner's vehicle, what reason or probable cause of any criminal activity did he have knowledge of at that time? Based solely on his feeling from the so-called nervous mannerisms of the petitioner, would he have been then able to obtain from a neutral magistrate a search warrant for that motor vehicle? Petitioner submits that the obvious answer to that question would be "no". All of the cases seem to agree that a general exploratory search is to be condemned, notwithstanding that it may satisfy the curiosity of the officer and even bear out his suspicions by being contraband or some other evidence of crime being discovered as a result of such curiosity. However, neither an arrest nor a search, otherwise unlawful, may be validated by what it produces, *Wong Sun v. United States*, (1963) 371 U.S. 471.

But probable cause should not be based on any sixth sense that some law enforcement officers might possess, nor upon mere suspicion of possible criminal activity. The *Carroll* opinion, *supra*, pointed out, as in all searches, there must be probable cause to believe "that the contents of the automobile offend against the law ..." 267 U.S. at page 156.

It is further submitted by the petitioner that the "plain view" doctrine, as recognized and discussed by this Court in some cases, is simply not applicable to the present case because the seized items were not in plain view, but were discovered by the searching officers taking affirmative steps in the nighttime, off of the public highway onto private property, and shining their flashlights into petitioner's vehicle, and thereafter seizing said items, all of such actions being inconsistent with the requirements necessary for the application of the "plain view" doctrine.

The only conclusion to be drawn from the actions of the officers from the time their attention was first drawn to the petitioner's motor vehicle until their discovery of the items in it which later turned out to be stolen is that they just felt like "something fishy was going on" and so they went fishing and discovered the evidence upon which this conviction was based. "Fishy" and suspicious circumstances standing alone should not be the foundation for a criminal prosecution such as this which has resulted in a penitentiary sentence of not less than three nor more than ten years for the petitioner. There is not present in this case either probable cause or exigent circumstances, both of which are required before a warrantless search of a motor vehicle may be validly conducted. Petitioner, therefore, contends that from a thorough examination of the circumstances surrounding the search of his motor vehicle, the only reasonable conclusion to be drawn is that the search and subsequent seizure of the evidence was unreasonable, and, therefore, clearly in violation of the Fourth Amendment as applied to the states through the Fourteenth Amendment to the United States Constitution.

VII

SUMMARY AND CONCLUSION

In summary, petitioner submits that only one logical conclusion can follow from an analysis of the circumstances under which the evidence was obtained that resulted in the petitioner's conviction, namely, that it clearly resulted from an unreasonable search in violation of the Fourth Amendment to the United States Constitution, and that, therefore, the trial court committed prejudicial and reversible error in overruling petitioner's motion to suppress such evidence. Consequently, petitioner submits that this Court should issue a writ of certiorari to the Tennessee Court of Criminal Appeals, and thereafter reverse the Opinion of that Court and set aside the conviction of the petitioner, or in the alternative award him a new trial.

Respectfully submitted,

HUGH F. LaRUE, III
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Valley Fidelity Bank Building
Knoxville, Tennessee 37902
Telephone No. (615) 522-4191

Attorney for Petitioner

[fol. 1] IN THE CRIMINAL COURT
FOR BLOUNT COUNTY, TENNESSEE
AT MARYVILLE

STATE OF TENNESSEE

VS. No. 657

EARL EFFLER

MOTION TO SUPPRESS EVIDENCE BASED ON ILLEGAL SEARCH AND SEIZURE

(Filed January 2, 1973)

Comes now the Defendant Earl Effler by and through his attorney, Don Palmer, and says to the Court that upon the annexed affidavit of Defendant and upon all proceedings heretofore had herein, the undersigned will move this Court at a Criminal Term thereof to be held at the Courthouse, located at Court Street in the County of Blount, State of Tennessee, at Maryville, for an Order suppressing and prohibiting the use in evidence of all property seized from the Defendant Earl Effler and from his automobile and for such other and further relief as to which he may be entitled.

This the 2nd day of January, 1973.

/s/ Don Palmer
Attorney for Defendant

Suite 511
Blount National Bank Bldg.
P. O. Box 267
Maryville, Tennessee 37801

[fol. 1] IN THE CRIMINAL COURT
FOR BLOUNT COUNTY, TENNESSEE
AT MARYVILLE

[Caption Omitted]

AFFIDAVIT IN SUPPORT OF MOTION TO SUPPRESS

(Filed January 2, 1973)

Earl Effler, being duly sworn, deposes and says:

1. I am the Defendant in the above entitled proceeding. I submit this affidavit in support of my motion to suppress evidence illegally seized by officers of the Blount County Sheriff's Department.

2. On December 3, 1972, my automobile was stopped just off a public throughfare in Blount County, Tennessee, when two officers of the Blount County Sheriff's Department instructed me to come to their car. Whereupon they seized me and placed me in their automobile. They went out of my presence to where my automobile was parked and searched the automobile and claimed to have found in that search certain items which were alleged to be stolen.

3. At no time did they display a warrant to search or arrest.

[fol. 2] 4. I was taken to the Blount County Jail where I was held without charge and without bail bond from Sunday evening, December 3, 1972, until Wednesday morning, December 6, 1972.

5. I am advised by counsel that the evidence was thus obtained in violation to my rights to the Fourth Amendment to the Constitution of the United States.

Wherefore I respectfully submit the request that the Court grant me an Order suppressing the evidence in prohibiting its use as evidence.

/s/ Earl D. Effler
Defendant

STATE OF TENNESSEE)
COUNTY OF BLOUNT)

Personally appeared before me the above Affiant, Earl Effler and made oath that the above contained statements are true.

This 2nd day of January, 1973.

/s/ Sherry Harbin
Notary Public

My Commission Expires:

Nov. 11, 1975

IN THE CRIMINAL COURT FOR BLOUNT COUNTY, TENNESSEE AT MARYVILLE

[Caption Omitted]

HEARING ON MOTION TO SUPPRESS

January 2, 1973

* * *

[2] BE IT REMEMBERED THAT A CRIMINAL COURT Commencing on the First Monday in December, 1972, was held in and for the Blount County at the Courthouse in Maryville, Tennessee, by the Honorable Lloyd G. McCluen, Judge of the Fourth Judicial Circuit of Tennessee, when the following proceedings were had:

The above-styled case came on for hearing on this January 2, 1973, before the Honorable Lloyd G. McCluen, Judge of the Criminal Court, when all parties announced ready for trial.

Whereupon the following proceedings were had, to-wit:

Jury was qualified by the Court, and accepted by the State and the defense.

The defendant made no motion for a special panel or objection at the trial to the Court's proceedings in selecting the Jury.

THE COURT: There is a preliminary matter that I must pass on in the absence of the Jury so take them over in the library, Mr. Paul and we will call them in just as soon as I get the preliminary matter taken care of. There is a possibility that it might terminate the lawsuit, but I have to pass on it in the absence of the Jury. So if you all will step right over there please we will get the case started in just a little while.

JURY LEAVES COURTROOM.

[3] THE COURT: All right, Mr. Palmer, you are the movant in here. You have a motion to suppress.

MR. PALMER: Yes, Your Honor. I would like to call Officer Proctor.

THE COURT: All right, call your officer up here, please. This is for the purpose of the Motion to Suppress only.

MR. PALMER: Yes, sir.

MR. MARK PROCTOR,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DON PALMER:

Q Your name, please, sir?

A Mark Steven Proctor.

Q All right, Mr. Proctor, you are a deputy sheriff of Blount County?

A Yes, I am.

Q And were back on December 3, of this year?

A Yes, sir, I was.

Q And on that date you had occasion to be in or near the community of Wildwood, did you not?

A Yes, sir, I was.

Q And what was the road that you were on out there?

A Marshall Hill Road.

Q Marshall Hill Road?

A Yes, sir.

[4] Q And as I understand it that while you were out there you saw the defendant, Mr. Earl Dean Effler?

A Yes, I did.

Q About what time was it when you first saw him,

Mr. Proctor?

A It was approximately 7:00 o'clock P.M.

Q All right. I take it that it was somewhat dark?

A Yes, sir, it was.

Q This car was parked on the side of the road, was it not?

A When I first noticed it it wasn't parked.

Q All right, where was it when you first noticed it?

A When I first noticed Mr. Effler's car I was approximately 200 feet from his car, and he was in the process of backing up into a small opening into a field where a gate had been and someone had taken the gate down.

Q Someone had taken a gate down?

A Yes, sir.

THE COURT: Where a gate had been taken down?

A Yes, sir.

Q Had the gate recently been taken down, or had it fell?

A As far as I know, there has not been a gate there for at least two months.

Q You do patrol this area regularly?

A Yes, sir, I do.

[5] Q Did you notice what kind of license plates this car had on it?

A I don't recall the exact number but it was Knox County license.

Q Knox County tags. Then at that particular point where you were in Blount County, how far were you from the Knox County line?

A Oh, I would say approximately by going by way of Chapman Highway and Nells Creek Road it would be a distance of, and this is a rough estimation, a distance of approximately 10 miles.

Q You say from there to the Knox County line it would

be ten miles?

A Approximately.

Q Now when you first saw the car, it was backing up and turning around, did you pull your patrol car over or just exactly what did you do?

A When we first saw the car, as I say it was 200 feet away, it had its lights off all except its parking lights and it was cross ways in the road. At first it was like it was kind of coming toward us and then it was cross ways of the road, and then it proceeded to back up off the roadway, approximately 20 feet up in the field.

Q All right, then did you then pull your cruiser over?

A Yes, sir, I proceeded on down to the front of his car.

[6] Q When you pulled in, I take it the way you pulled in you were blocking his access to the highway at that time?

A I don't know if I ... I don't remember if I was blocking his access or not.

Q Okay, about how far was your cruiser from his car?

A Approximately 15 or 20 feet.

Q All right. Did you get out of your cruiser?

A Yes, sir, I did.

Q Was there anyone with you?

A Yes, sir.

Q Who was that?

A Officer Kimball.

Q Was you driving or was he driving?

A I was driving.

Q When you got out of the cruiser, did you go over to Mr. Effler, or did you call him over to you?

A When I got out of my cruiser, Mr. Effler was getting out of his car and I just took a couple of steps there and met him. He was walking down toward the cruiser.

Q All right, did you have a conversation with him?

A Just a very brief conversation.

Q All right. Did you place him under arrest?

A No, sir, I did not.

Q All right, did you place him in your car?

A I asked him if he would like to sit down in the car.

Q Okay and he did that?

[7] A Yes, sir, he did.

Q And did you go over to his car?

A I think we might have gotten off the track a little ways there. We had already walked up to his car before I asked him to have a seat in our car, asked him if he would like to have a seat in our car.

THE COURT: You did what now? I didn't understand your answer.

A When we .. When Mr. Effler walked down to the car and I took a few steps toward him, we made some small talk there, don't remember the exact words, but I asked him if he was from Knox County and so forth. And if he had any problem and walked up to his car and Mr. Effler was with me. And it was after I walked up to his car and saw the contents of the car that I asked Mr. Effler if he would like to have a seat in our cruiser.

Q All right, when you saw the contents of his car, was he standing at his car or was he in your cruiser?

A He was standing at his car.

Q Okay. He was outside the car?

A Yes, sir, he was.

Q And where were the things that you saw in his car?

A Lying in the back seat ....

Q Back seat?

A And back floorboard.

Q And the back floorboard?

[8] A Uh huh.

Q And what did you see in the back floorboard?

A Those three firearms. Two rifles, they seemed to me, I am no antique dealer, but they were made like they were fairly old antique type weapons, and a shotgun.

Q All right.

A Plus a number of Christmas packages in disarray. They looked like they had been ripped and torn open. Christmas paper like had been ripped from them and was lying on the floor, they were partially open showing a little girl's dresses and stuff like this. And there was one ... there was small lead shot like muzzle loading rifle like you would use in them all over the floorboard, a can of black gunpowder and things like this. Some of the packages had been ripped open. The majority of them had.

Q Okay. And you could see those in the car?

A Yes, sir, I could.

Q Did you shine your light in there, or was the car door open and the car light on, the interior light on, or how could you see in there?

A I had my flashlight with me. I don't remember whether the dome light was on or not. I did have my flashlight with me, I may or may not have shined it in. It was after dark so I imagine I did. Since it was after dark, I automatically done it.

Q All right, so after you saw the contents of the car, you took him over and asked him to have a seat in
[9] the cruiser?

A Yes, sir.

Q And you asked him to have a seat in the car?

A Yes, sir. I never at any time told him to get in the car, I asked him if he would like to sit in the car. We were going to check him.

Q Then what did you do?

A I got on the radio and .. Well, first I talked to Officer Kimball there, approximately a minute outside the car.

Then I got on the radio and radioed to the jail and asked for Sgt. Don Hobbs, Sergeant with the Blount County Sheriff's Department at that time.

Q Okay.

A And Sgt. Hobbs and Chief Herman Householder proceeded up to that point. They arrived in, oh, 12 or 15 minutes.

Q All right, where was Mr. Effler while you were waiting on them to arrive?

A Mr. Effler was sitting in the car.

Q Police car?

A Yes, sir.

Q And after they arrived, what happened?

A I informed Officer Hobbs of the circumstances. I informed Officer Hobbs that it was my belief that there was a good possibility that those were stolen items in the car.

Q Now at that time, had you had a call about stolen items of that type?

A No, sir, not at that time.

[10] Q Did you have a warrant for this man?

A A warrant?

Q A warrant.

A No, sir, I did not.

Q You didn't have a warrant for the arrest of this man?

A No, sir, I did not.

Q And you had no call about any items like that having been stolen, at that time?

A Not at that time, I did not.

Q So after you informed them that you felt that there was a chance that these things might be stolen, what did you do?

A Officer Hobbs. I just informed Officer Hobbs.

And we talked about the items and the position they were in and the disarray, looked like they were ripped open. Mr. Hobbs went down and talked to Mr. Effler just a minute. I don't know exactly what he said to him, but he did place him under arrest for investigation.

Q Investigation?

A Yes, sir.

Q Made no charge against him. Just placed him under arrest for investigation, is that right?

A As far as I know.

Q Well, as a matter of fact, this man was booked in on investigation down here at the Blount County Jail, was he not?

A When he was booked in for investigation, if [11] my memory serves me right.

Q All right, then there was no charges lodged against him although he was held in Blount County Jail the following week, is that right?

A I don't know. I don't check the jail blotter every day.

Q Okay. Did you ever get inside the car and go through these items?

A Yes, sir, after we confiscated the items I did.

Q When did you do that?

A That was after we arrested him.

Q After you arrested him, there on the scene?

A Yes, sir.

Q After you placed him under arrest for investigation.

A Yes, sir.

Q You went inside the car and made an inventory of the items?

A Yes, sir.

Q Okay. Did you search Mr. Effler there on the scene? His person?

A Yes, sir.

Q Did you find any weapons on him?

A If I found any weapons, it was a pocket knife. And I don't remember if he had a pocket knife or not.

Q Didn't find any gun or anything on him, did you?

A No, I did not.

[12] CROSS EXAMINATION

MR. H. KENNETH DEATHERAGE:

Q Mr. Proctor, at the time that you asked him if he would like to have a seat in your car and he did. At that time, if he had attempted to run, would you have stopped him?

A Yes, sir, I would have stopped him.

Q You later said that you felt like these items were stolen, what made you come to that conclusion?

A Well, it is kind of a long story. Last year that area there was hit so heavily around Christmas with breaking and entering cases. And Christmas packages were main things that were stolen along with guns. And it seemed odd that this man should be turning around with his lights off and backing that far off the road to be turning around. And then when I got out of my car, he walked down to my car. He seemed to be very nervous. He was more or less, you know what I mean, wringing his hands, so to speak. He took a cigarette out and lit it when we were walking back to the car, and took about three puffs off of it and threw it down and stomped it out. As I say, I am not an antique dealer, but these did seem to me like they could be very expensive weapons. They looked like they were quite old. These Christmas packages, part of them had been torn open, and part of them weren't. I couldn't see why he would have them torn open at that time. Under those circumstances, I felt it was my duty and I felt

that I was doing the right thing if I made a little
[13] further investigation and found out just what the problem was.

Q Did you get a license check on the license that was on the vehicle?

A I believe Officer Hobbs has got that or the jailer Herb Ambern got that after we got back to the jail. And I don't recall at this time who it was registered to.

Q Now where he was backed up there, was that on private property?

A Yes, sir, it was.

Q At any time, did Mr. Effler claim any ownership of the automobile, or of the goods that were found in it?

A Not at the time we at his car, no, sir. Later on he did.

Q How much later on?

A When Officer Hobbs, Chief Householder and myself interrogated him, at approximately 8:10 P.M. that night. Approximately an hour and ten minutes later.

Q Was that after you got back to the jail?

A Yes, sir, it was.

Q Any time while you were out there in the car, checking the items in the car, did he assert any ownership of the car or of the goods?

A No, sir, he never asserted any ownership of anything while I was out there. I actually didn't question him that much, I mean at the time. I was wanting to
[14] get someone ... a Sergeant or someone with a little bit more authority out there at the time.

Q How long have you been an officer?

A I have been an officer for about a year, but there is so much to learn that I still would rather have someone with a little bit more experience.

Q Well, Mr. Proctor, you will be learning 20 years

from now.

I believe that is all.

REDIRECT EXAMINATION

MR. DON PALMER:

Q Mr. Proctor, you saw this man sitting in the car didn't? There is no question about that, is there?

A No, sir, he was sitting in the car.

Q And you saw him get out of the car?

A Yes, I did.

Q You actually saw him operating the vehicle, didn't you?

A Yes, sir.

Q As far as your saying to him, "Whose items are these?" or "Are these your items?" Did you question him out there about that? Other than ask him if you could assist him and things like that?

A Well, to the best of my knowledge, at the [15] time of the talk ... the conversation that was carried on between us was that I asked him if he had any trouble, and he said no, he was turning around. I saw the packages and guns in the back seat and I asked him if those were his guns, they were good looking guns, and he said, "Yes, I just bought them."

Q Yes, I just bought them?

A Yes, sir.

Q You can remember him saying that?

A Yes, I am pretty sure that he did.

Q That is all that I have of this witness.

MR. FLOYD F. KIMBALL,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. DON PALMER:

Q State your name, please?

A Floyd F. Kimball.

Q How old a man are you?

A I am 46 years of age.

Q And you are a Blount County Deputy?

A Yes, sir.

Q How long have you been a deputy, Mr. Kimball?

A I have been a deputy since September 1.

Q You heard the testimony of your partner, Mr. Proctor, of what happened back on December 3, 1972, is your testimony the same as his, generally, regarding the circumstances?

[16] A Yes, sir.

Q Did you actually ever go up to the car until Mr. Effler was placed in the police cruiser?

A Yes, sir, I was alongside the car when he was at the cruiser.

Q When he was at the cruiser, you went up to his car?

A Yes, sir.

Q Had you gone up there before that time?

A No, sir.

Q All right. Did you shine a flashlight in the car or did you get in the car or what did you do?

A I had a flashlight in my hands.

Q Do you remember flashing it in there and looking around?

A I believe it did go in there.

Q At the time when you all had a little bit of a dis-

cussion out there in front of the car, I take it that you had had no calls relative to stolen property, had you?

A No, sir.

Q And you weren't looking for Christmas packages or antique guns or any of these things, were you?

A No, sir.

Q And as a matter of fact, you hadn't seen Mr. Effler involved in any illegal activities, had you?

A No, sir.

Q That is all.

[17] CROSS EXAMINATION

MR. H. KENNETH DEATHERAGE:

Q Mr. Kimball, prior to that time, had you all received any information about a stolen car that fit that description?

A No, sir.

THE COURT: What was that question again?

Q I asked him if he had had any information with regard to stolen automobiles that fit the description of the automobile that Mr. Effler was driving.

THE COURT: All right.

Q I didn't ask it quite that plainly, Judge, but that is what I meant.

Now were you in the cruiser at the time Mr. Effler got in there and sat down?

A No, sir.

Q You were outside?

A Yes, sir, I was outside the cruiser.

Q And I will ask you this—If he had attempted to walk away from there or run away from there at that time while he was sitting there in the cruiser, would you have stopped him?

A Yes, sir, I sure would have.

Q What was the circumstances, Mr. Kimball, that prompted you to look in the automobile and check these items?

A Just the way Mr. Effler was acting. He was
[18] very nervous and he just seemed to want to keep us away from the car.

Q What did he do to try to keep you away from the car?

A Well, the minute he seen the cruiser he came walking up to the cruiser and asked us what was wrong.

Q Anything else?

A That is about all.

Q Did he light any cigarettes there in your presence?

A Yes, sir, I believe he lit a cigarette and threw it down immediately. He didn't take but two or three drags off of it.

Q Was he wringing his hands?

A Wringing his hands and acting nervous.

Q Did you ask him where he got all those items?

A I believe I asked him where all those items came from and he said he had been to a Christmas party or something to that effect.

Q Been to a Christmas party?

A Yes, sir.

Q All right, that will be all.

THE COURT: When you and the other officer were cruising, when did you first see this car? Was it on the road?

A He was on the road ...

THE COURT: When you saw him what did he do?

A He got out of his car and came toward the
[19] cruiser when he stopped his—when he backed it back off in this field.

THE COURT: When he saw what?

A When he backed off into the field he got out of the

car and came up to the cruiser and asked us what was wrong.

THE COURT: Was his car moving when you first saw him or was it stopped?

A Yes, sir, it was moving. It was backing up into this private drive into the field.

THE COURT: It was in the course of backing up into this private drive into a field when you first saw it?

A Yes, sir, without lights on.

THE COURT: Without lights on?

A Yes, sir.

THE COURT: You never did see the car before that with lights on?

A No, sir.

THE COURT: And the only way you could tell it was moving was your lights was shining on the car?

A Yes, sir.

THE COURT: He had no lights on at all?

A The parking lights may have been on but he didn't have no other lights on.

Q Mr. Kimball, did you, subsequent to the time you finally did arrest Mr. Effler up there, did you learn where Mr. Kenneth Cornett's house was?

A I would say it was approximately an hour [20] and 15 minutes after that.

Q That you learned where his house was?

A Yes, sir.

Q And how far was his house from this place where you saw this car backing up into the field?

A I would say pretty close to a half a mile.

Q A half a mile?

A About a half a mile.

REDIRECT EXAMINATION

MR. DON PALMER:

Q Mr. Kimball, when you first saw this car, did you know that there was a Mr. Ken Cornett living in Blount County?

A No, sir.

Q I believe you said that when you first saw him that Mr. Effler's parking lights were on, did you not. When you first saw him?

A I don't really know, I believe they were. He didn't have no other lights on.

Q And he was in the process, as I understand it, when you first saw him, on the public highway, was he not in the process of backing off?

A On a gravel road.

Q On a gravel road?

A Right.

[21] Q And this was an open field, there wasn't any houses or barns or anything in it, were there?

A That is right, an open field.

Q An open field. Okay, I believe that is all.

THE COURT: What attracted your attention to this car?

A The lights being off and him backing up into an open field.

MR. PALMER: I would like to recall Mr. Proctor back to the stand.

THE COURT: All right.

[MR. MARK PROCTOR]

DIRECT EXAMINATION

MR. DON PALMER:

Q Mr. Proctor, where was this automobile when you first saw it?

A When we first saw it we came across the top of a hill and it was approximately 200 feet in front of us and our lights hit it, and it was kind of catty corner, it was moving just slightly ...

Q Was it on the public highway when you saw it?

A When I saw it it was still on the public highway, and it couldn't been more than 3 or 4 seconds, it just backed up there 15 or 20 feet up in the field and stopped.

Q And did you see any lights on on this car?

A His parking lights were the only thing that [22] was on.

MR. PALMER: Okay, I just want to make that clear.

MR. DONALD HOBBS,

being first duly sworn, testified as follows:

DIRECT EXAMINATION

MR. DON PALMER:

Q You are Sgt. Donald Hobbs?

A I was at that time with the Blount County Sheriff's Department.

Q You are no longer with the Sheriff's Department?

A No, I am with the City of Maryville.

Q With the City of Maryville. I didn't know that. Sgt. Hobbs, I take it you were not when Mr. Effler was first placed in custody?

A I would say I wasn't.

Q When you got out there, do you remember what time it was?

A It was about 7:20.

Q And where was Mr. Effler when you got out there?

A He was sitting in the back of the patrol car.

Q And did you talk to him?

A Yes, sir, I did.

Q Was that before or after you went and looked in the back of his car?

[23] A Before.

Q All right, what kind of conversation did you have with him?

A I talked to Mr. Proctor out there and he explained to me what he had done, and I opened the back door and asked Mr. Effler to get out, and, based on what the two officers had told me, I placed Mr. Effler under arrest for investigation. I advised him of his rights. I asked him if the car belonged to him. I think his reply was that he was buying the car at that time. I asked him if the items in the car belonged to him and he said yes, they did. And I asked him where he got them. He said that he bought them from two boys at a carwash, down the road.

Q And then did you proceed to go up and look at his car?

A Yes, sir, I did.

Q And did you bring him back to Blount County Jail? Or did he come back with Officer Proctor?

A He came back with Officer Proctor.

Q And I take it you booked him in on investigation?

A Yes, sir, he was.

Q And do you have knowledge that that was the only charge against him until Wednesday following that Sunday evening arrest?

A I think it was Tuesday, although I am not sure.

Q And that is when he was charged with possession of stolen property, is that not right?

[24] A Yes, sir, receiving and concealing.

Q All right, and he was not taken before a judge or magistrate before that time?

A No, sir, he wasn't.

Q I believe that is all.

CROSS EXAMINATION

MR. H. KENNETH DEATHERAGE:

Q Sgt. Hobbs, how long after you had been out there on the road with Mr. Effler, Mr. Proctor and Mr. Kimball, was it until you learned about a break-in at Mr. Ken Cornett's home?

A We didn't learn about it until we came back to the jail, it was 45 minutes later, or an hour later.

Q At that time, did Mr. Cornett come to the jail?

A Yes, sir, he did.

Q Was he able to identify the articles at that time?

A Yes, sir, he did.

Q And were you able to get hold of the Judge to issue a warrant or anything?

A No, sir, I am not sure that we couldn't.

Q Why?

A Well, we hadn't interrogated Mr. Effler at that time.

Q In other words, you didn't feel like your investigation was complete, is that correct, sir?

[25] A No, sir.

Q Did you continue your investigation until Tuesday, Wednesday?

A We went back out there that night until almost daylight, investigating through the area out there. Then the following evening it was raining, and Mr. Cornett wanted to check footprints and I know it was raining, it was postponed for a while and they covered the footprints up. And I know it was either the next evening or the day after that that we went back out there and checked.

Q Now at the time you first got out there, where Mr.

Proctor and Mr. Kimball had taken Mr. Effler into custody, what was the ... Did you ever look in the automobile?

A Yes, sir, I did.

Q Was this before or after you placed him under arrest?

A After.

Q What had you learned from Mr. Proctor and Mr. Kimball that prompted you to look in the car?

A Officer Proctor advised me of what he had observed in the car, some guns, and Christmas packages, some wrapped and some torn apart, and I felt that was grounds enough and the way the man had backed in, like someone would be dodging or trying to evade the car coming down the road, whoever it might have been. And I felt that was grounds enough for investigation.

Q Did Mr. Proctor and Mr. Kimball also tell [26] you that he was wringing his hands?

A No, sir.

Q Did they tell you that he lit a cigarette and took two or three puffs off of it and threw it down?

A No, sir, they just described him as being nervous, but they didn't describe those conditions.

Q I believe that is all.

* * *

Blount County, Tennessee,
CRIMINAL COURT

[fol. 1] [Caption Omitted]

ORDER OVERRULING MOTION TO SUPPRESS

(Filed January 2, 1973)

Comes now the defendant, through and by counsel, and makes a motion to the Court to suppress the evidence to be used in this case for the reason set out by Written motion and affidavit.

After hearing all of the arguments of Counsel for the defendant, and the Attorney General, who represents the State, it is the opinion of the Court that the motion is not well taken and the same be and is hereby overruled.

This the 2nd day of January, 1973.

/s/ Lloyd G. McCluen
Criminal Judge

STATE OF TENNESSEE

VS NO. 657

Earl Dean Effler

[fol. 1] **FELONY JUDGMENT (GUILTY)**

(Filed January 3, 1973)

Came the Attorney General, who prosecutes for the State and the Defendant, in his own proper person and by counsel, who being arraigned upon the Indictment exhibited against him for Concealing Stolen Property and for a plea thereto says he is not Guilty and puts himself upon Country for trial and the Attorney General doth the like. Thereupon came a Jury of good and lawful men and women, citizens of Blount County, To-wit:

1. Helen S. Hodge
2. Mabel Bayless
3. Dorothy M. McCall
4. Jerry Blevins
5. Grady M. Houk
6. Virginia P. Queener
7. Samuel G. McCall
8. J. H. McClanhan
9. D. R. McCammon
10. Harold E. Moats
11. Mayford C. Lane
12. Linda Purkey

who being duly summoned, elected, empaneled, tried and sworn according to law and having heard all of the evidence and the pleas heretofore entered, and received their charge from the Court, upon their oaths, do say, "We the Jury find the Defendant Guilty of Concealing Stolen Property and fix his punishment at a maximum period of (10) Ten Years in the Tennessee State Penitentiary.

It is therefore ordered by the Court that according to the findings of the Jury aforesaid, that the defendant is Guilty of Concealing Stolen Property, and for his offense will be confined in the State Penitentiary for not less than (3) Three Years nor more than (10) Ten Years. The Defendant is taxed with all of the costs of this case for which let an execution issue. The Warden of the Penitentiary

will be notified of this Judgment. Defendant is rendered infamous. $5,000.00 bond set pending any motions.

This the 3rd day of January, 1973.

/s/ Lloyd G. McCluen
Criminal Judge

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

KNOXVILLE

SEPTEMBER SESSION, 1973

EARL DEAN EFFLER Plaintiff-in-Error	No. 58 Blount County
v.	Hon. Lloyd G. McCluen, Judge
STATE OF TENNESSEE Defendant-in-Error	(Concealing Stolen Property over the value of $100)

For Plaintiff-in-Error:	For Defendant-in-Error:
E. D. McCasland, Jr. 205 Clinch Avenue Knoxville, Tennessee 37902	David M. Pack Attorney General Nashville, Tennessee
	R. Jackson Rose Assistant Attorney General Nashville, Tennessee
OPINION FILED; Feb. 25, 1974	
AFFIRMED Robert K. Dwyer Judge	H. Kenneth Deatherage Assistant District Attorney General Kingston, Tennessee

[fol. 1] **OPINION**

The plaintiff-in-error was convicted for committing the offense of concealing stolen property over the value of $100, see T.C.A. 39-4217(C), with resulting confinement for not more than ten years.

There is one assignment of error urged here, that is, the trial court erred in overruling the plaintiff-in-error's motion to suppress the evidence upon the contention that the arrest and search were illegal.

The facts as found from our review reflect the evidence to reveal that on December 3, 1972, around 7:00 p.m. two deputies, patrolling on Marshall Hill Road in Blount County, noticed a car crossways in the highway 200 feet in front of them. This car's headlights were not on but the parking lights were. They observed the car backing off the road into an opening leading to a field. The deputies stopped their cruiser at which time the plaintiff-in-error alighted from his car and approached their cruiser. He inquired of them what was the trouble. The deputies noticed him wringing his hands and nervously puffing on a cigarette. They approached the plaintiff-in-error's car and with the aid of a flashlight saw on the back floorboard three guns: an antique rifle, a .22 caliber rifle and a .20 gauge shot-
[fol. 2] gun. They also noticed Christmas packages on the back seat, some of which had been ripped open, displaying their contents. The officers further noticed equipment for a muzzle-loading rifle. They placed the defendant in the cruiser and called for their superior officer. The superior, upon arrival at the scene, placed the plaintiff-in-error in custody. It was developed at the hearing that the deputies had been paying particular attention to the area where plaintiff-in-error was arrested because there had been a rash of breakins

in that vicinity the past Christmas season and many Christmas presents had been stolen.

The trial court, after a full hearing, with only the deputies and their superior testifying, found the arrest and search to be lawful. With this we agree.

In the first instance the deputies surely had a right, after seeing the car crosswise in the road, to investigate. We are also satisfied that the operation of the car on the highway at that time without lights was an offense committed in the officers' presence. See T.C.A. 59-909. In the second instance, they had the right to be where they were when making this investigation and to look into defendant's car. This is not a "search" as such. See *Armour v. Totty*, ___ Tenn. ___, 486 S.W.2d 537, 538, 539. Nor do we think that the officer's use of the flashlight constituted an unlawful search. See *Smith v. State*, 155 Tenn. 40, 42, 290 S.W. 4. When the officer saw the Christmas packages ripped open some time before Christmas, having prior knowledge that burglaries in-

[fol. 3] volving stolen Christmas presents had occurred in that area, we think his actions in detaining the defendant and in confiscating the goods was not unreasonable. The assignment is overruled.

We note, in closing, that the evidence at the trial reflected that the owner's home was burglarized the day plaintiff-in-error was arrested. The owner identified the items found in the plaintiff-in-error's car as having been taken from his home, which was a mile away from the arrest location. The plaintiff-in-error did not testify but did offer witnesses who testified that he had bought the guns from an unknown party whom he had given a push after happening upon the party and his stalled truck. The plaintiff-in-error at that time had been on his way to have

his car washed in Maryville. The jury's verdict has discredited his theory. The evidence does not preponderate against that finding here. See *Grace v. State*, ___ Tenn. ___, 493 S.W.2d 474, 476.

In finding no merit in plaintiff-in-error's only assignment of error, we affirm the judgment.

/s/ Robert K. Dwyer
Robert K. Dwyer, Judge

Concur:

/s/ Mark A. Walker
Mark A. Walker, Presiding Judge

/s/ Charles Galbreath
Charles Galbreath, Judge

[fol. 1] **COURT OF CRIMINAL APPEALS OF TENNESSEE**
At Knoxville

EARL DEAN EFFLER	No. 58 Blount County (No. 657)
vs.	Offense Concealing Stolen Property
STATE OF TENNESSEE	AFFIRMED 2/25/74

JUDGMENT
(Filed February 25, 1974)

FILED FOR WRIT OF CERTIORARI

Came the plaintiff in error Earl Dean Effler, by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Blount County; and upon consideration thereof this Court is of opinion that there is no reversible error on the record and that the

judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by this Court.

It is, therefore, ordered and adjudged by this Court that the plaintiff in error, for offense of Concealing Stolen Property be delivered to the Warden of the penitentiary, or his agent, and be by him committed to the penitentiary of the State of Tennessee and there confined at hard labor for a term of not more than Ten (10) years, and not less than Three (3) years, commencing on the day of his reception at said penitentiary.

The sentence of imprisonment will be credited with the time the plaintiff in error spent in jail pending this appeal. The number of days of such confinement will be certified to the Warden by the Clerk of the Court below.

It is further ordered by the Court that plaintiff in error be infamous and disqualified from holding any office under this State, or exercising the elective franchise.

The plaintiff in error will pay the costs of the cause accrued in this Court, and in the Court below, and execution may issue from this Court for the costs of the appeal. A procedendo will issue to the said Criminal Court of Blount County, directing that Court to proceed with the collection of the costs of the cause accrued therein in the manner provided by law.

The Clerk of this Court will issue a duly certified copy of this judgment to the Sheriff of Blount County, which will be his authority for delivering the plaintiff in error to the Warden or his agent; and also a duly certified copy hereof to the Warden of the penitentiary, who will at once proceed to execute this judgment.

In the event the plaintiff in error files a petition for certiorari in the Tennessee Supreme Court, he may be admitted to bail on bond in the penalty of $10,000.00 with sufficient sureties to be approved by the Clerk of this Court, conditioned as in bail bonds in felony appeals, for his appearance in the Supreme Court; and in default of such bond he will be remanded to the Sheriff of Blount County.

Mark A. Walker

Charles Galbreath

Robert K. Dwyer

FELONY — Affirmed (Infamous)

[fol. 1]

SUPREME COURT OF TENNESSEE, AT KNOXVILLE

SEPTEMBER TERM, 1973

DECREE

(Filed April 1, 1974)

[Caption Omitted]

This case coming on to be heard upon a transcript of the record from the Criminal Court of Blount County, opinion and decree of the Court of Criminal Appeals, petition for certiorari, assignments of error and briefs of counsel, upon consideration whereof the Court is of opinion that the petition for writ of certiorari is not well taken, and said petition is denied.

Order

The petitioner Earl Dean Effler will pay the costs incident to filing petition for certiorari, for which let execution issue.

Ross W. Dyer, C.J.
Chester C. Chattin, J.
Allison B. Humphreys, J.
George F. McCanless, J.
William H. D. Fones, J.

[fol. 1]

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE, AT KNOXVILLE

[Caption Omitted]

ORDER

(Filed April 2, 1974)

Upon motion of the plaintiff in error, Earl Dean Effler, he is hereby granted a stay of execution of the judgment of this Court rendered on February 25, 1974, for a period of ninety days from April 1, 1974, pending the filing and disposition of a petition for the writ of certiorari in the Supreme Court of the United States, his petition for the writ of certiorari to the Supreme Court of Tennessee having been denied on April 1, 1974, during which time he may remain at liberty upon his present $10,000.00 cash appearance bond to the Supreme Court of Tennessee, now on deposit with the Clerk of this Court, his surety thereon expressly consenting to remain bound thereby by approval of this order.

A copy of the petition for certiorari, certified by plaintiff in error's counsel and showing the date of its filing in the United States Supreme Court, will be filed promptly with the Clerk of this Court.

At the conclusion of such ninety-day period, however, if the plaintiff in error has failed to perfect his
[fol. 2] petition for the writ of certiorari in the United States Supreme Court, the Clerk will notify the Sheriff and the surety for the plaintiff in error that the judgment heretofore entered by this Court will be executed forthwith.

The Clerk of this Court will issue a duly certified copy of this order to the Clerk of the Criminal Court of Blount County and the Sheriff of Blount County.

Enter this 2nd day of April, 1974.

/s/ W. Wayne Oliver
W. Wayne Oliver, Judge

APPROVED:

/s/ Earl Dean Effler
Earl Dean Effler
Plaintiff in Error

/s/ Edward J. Hodge
Edward J. Hodge
Surety